

1
2
3
4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 RICHARD S.,

8 Plaintiff,

9 v.

10 COMMISSIONER OF SOCIAL SECURITY,

11 Defendant.

CASE NO. 3:19-cv-05230-BAT

**ORDER REVERSING AND
REMANDING**

12 Plaintiff seeks review of the denial of his application for Disability Insurance Benefits.
13 He contends the ALJ erred when he failed to (1) provide clear and convincing reasons for
14 rejecting Plaintiff's testimony; (2) provide specific and legitimate reasons for rejecting an
15 examining physician's opinion; (3) properly account for a DDS consultant's opinion in his
16 residual functional capacity ("RFC") finding; and, (4) provide germane reasons for rejecting the
17 testimony of Plaintiff's wife. Dkt. 10.

18 As discussed below, the Court **REVERSES** the Commissioner's final decision and
19 **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. §
20 405(g).

21 **BACKGROUND**

22 Plaintiff was 48 years old on the date of the ALJ's decision. Tr. 165. He graduated from
23 high school and attended three years of college. Tr. 46. He served in the Navy from 1990 to
1997, the Army from 1999 to 2002, and as a heavy equipment mechanic at Fort Lewis for the

1 Department of Defense from 2003 until 2016. Tr. 46, 165, 515, 638. During that time, Plaintiff
2 had four back and neck surgeries. He complains of tension headaches and migraines that lasted
3 from a couple of hours to days. Tr. 51. He returned to work after his last two surgeries at a light,
4 less than full-time level, but was unable to continue. He was medically retired in March 2018. Tr.
5 52. He has a 100% Veteran's Association ("VA") disability rating for a service connected
6 disability. Tr. 495.

7 On September 25, 2016, Plaintiff applied for Disability Insurance Benefits with an
8 alleged onset date of August 13, 2016. Tr. 159-68. He later amended the onset date to July 26,
9 2017. Tr. 15. His application was denied initially and on reconsideration. Tr. 65-99. A hearing
10 was held on May 16, 2018, before ALJ Keith Allred. Tr. 34-64. On August 29, 2018, Judge
11 Allred issued an unfavorable decision. Tr. 12-33. On January 22, 2019, the Appeals Council
12 denied Plaintiff's request for review, making the ALJ's decision the final agency decision. Tr. 1-
13 6. Plaintiff brings this action for judicial review pursuant to 42 U.S.C. § 405(g).

14 **THE ALJ'S DECISION**

15 Utilizing the five-step disability evaluation process,¹ the ALJ found that Plaintiff had not
16 performed substantial gainful activity since his amended onset date at step one of the sequential
17 evaluation process. Tr. 15. At step two, Judge Allred found that Plaintiff suffered from severe
18 degenerative disc disease, major joint dysfunction (right knee disorder), affective disorder, and
19 migraine. Tr. 17. At step three, he found that these impairments did not meet or equal any of the
20 Listings. *Id.* Judge Allred went on to find that Plaintiff had the RFC to perform light work with
21 occasional postural limitations and overhead reaching with the left upper extremity; no exposure
22 to extremes of cold, heavy vibrations, or hazards; and no interaction with the public. He could
23

¹ 20 C.F.R. §§ 404.1520, 416.920.

1 work in the vicinity of others, but not in cooperative teams, group meetings, or other group
2 activities, and needed a stable work routine with few changes. Tr. 20. At step four, relying on the
3 testimony of a vocational expert (“VE”), Judge Allred found Plaintiff was unable to perform his
4 past relevant work, but could perform other work at step five and, therefore, was not disabled.
5 Tr. 27.

6 DISCUSSION

7 A. Plaintiff’s Testimony

8 The ALJ is responsible for weighing a claimant’s allegations and resolving ambiguities in
9 the evidence. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). An ALJ’s decision
10 “must contain specific reasons for the weight given to the individual’s symptoms, be consistent
11 with and supported by the evidence, and be clearly articulated” SSR 16-3p, 2017 WL
12 5180304, *10. If a claimant has an underlying impairment that could reasonably be expected to
13 produce the symptoms alleged, and there is no evidence of malingering, an ALJ may discredit
14 the claimant’s subjective pain testimony by providing “specific, clear, and convincing reasons”
15 for doing so. *See, e.g., Morgan v. Comm’r*, 169 F.3d 595, 599 (9th Cir. 1999). Regardless of the
16 standard, “questions of credibility and resolutions of conflicts in the testimony are functions
17 solely of the [ALJ].” *Id.* Here, the ALJ provided multiple reasons for discounting Plaintiff’s
18 subjective complaints based on inconsistencies and other evidence. Tr. 22-23. Because the ALJ
19 provided multiple reasons, any error is harmless if a valid reason remains. *Carmickle v. Comm’r*
20 *Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008).

21 First, the ALJ noted that Plaintiff’s treating medical providers found him with fewer
22 functional limitations than those Plaintiff reported. Plaintiff testified he could not manage a light-
23 duty job full time (Tr. 49), and he needed to lie down at least six times a day for between 30

1 minutes to nearly two hours. Tr. 54. On January 24, 2017, Plaintiff's treating physician Dr.
2 Terrill Utt opined that Plaintiff could perform light work activity with no pushing, pulling, or
3 lifting greater than 20 pounds and no overhead working, or working at heights. Tr. 22 (citing Ex.
4 4F, p. 8). The ALJ gave Dr. Utt's opinions considerable weight as they are based on an
5 established and ongoing treatment relationship and firsthand knowledge of Plaintiff's physical
6 impairments and symptoms. *Id.* In addition, Anne Albert, P.A. and Gregory Raapana, P.A. also
7 concluded that Plaintiff maintained the capacity to lift at least 20 pounds and could continue
8 working. Tr. 257, 278. The ALJ also noted that none of Plaintiff's treating sources concluded
9 that Plaintiff's impairments and symptoms would be preclusive of all work at any level of
10 exertion and none subsequently revised their opinions or documented worsening of Plaintiff's
11 impairments and symptoms. Tr. 22-23. The ALJ did not err in considering contradictory
12 evidence from Plaintiff's treating sources when weighing Plaintiff's testimony. When weighing a
13 claimant's statements, the ALJ may consider "testimony from physicians and third parties
14 concerning the nature, severity, and effect of the symptoms of which [claimant] complains."
15 *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002). And when a claimant's statements
16 contradict the medical record, that "is a sufficient basis for rejecting the claimant's subjective
17 testimony." *Carmickle v. Commissioner*, 533 F.3d 1155, 1161 (9th Cir. 2008) (Plaintiff's
18 testimony that he can lift only 10 pounds occasionally versus physician's opinion that he can lift
19 up to 10 pounds frequently).

20 Second, the ALJ noted that Plaintiff has longstanding degenerative disorders of the spine,
21 which predated the alleged onset of disability by a "significant margin" and that after Plaintiff
22 injured his spine in 2002 and was honorably discharged from Army service on that basis, he
23 began work as a heavy equipment mechanic at Fort Lewis, and persisted in that capacity for

1 years despite his spinal impairments and migraines. Tr. 23. The ALJ also cited to medical
2 evidence that Plaintiff's pain improved with treatment. *Id.* In July 2017, after Plaintiff's cervical
3 spine surgery, his physician noted that his spine was improving with physical therapy and
4 recommended simply continuing with that conservative treatment. Tr. 583. Plaintiff was also
5 taking medication for his chronic pain, which his physician noted in March 2018, was stable. Tr.
6 659. And Plaintiff underwent a laminectomy procedure that resulted in "resolution of his
7 bilateral lower extremity symptoms". Tr. 575. The ALJ did not err in this assessment as
8 impairments that can be controlled with treatment are not disabling. *Warre ex rel. E.T. IV v.*
9 *Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006).

10 Third, the ALJ pointed out that Plaintiff worked in the past despite Plaintiff's alleged
11 disabling impairments. Tr. 23. For example, Plaintiff complained of migraines when working for
12 the Navy, work that dated back to 1997 (Tr. 306, 480); he reported that following deployments to
13 the Persian Gulf, he experienced symptoms that included joint and muscle pain and headaches
14 (Tr. 603); and even though he was discharged from service for medical reasons, he worked as a
15 heavy equipment operator for years after his discharge despite his headaches (*see, e.g.*, Tr. 213
16 (issues with headaches began 12 years prior); *see also* Tr. 169-72, 176-77 (substantial gainful
17 employment years after he left the military). Plaintiff also alleged he was irritable (Tr. 514) and
18 had difficulty getting along with others. Tr. 220. The ALJ noted that Plaintiff reported mental
19 health symptoms also dating back to 1997 when he left the Navy (Tr. 514) but was able to
20 maintain employment thereafter. Based on the foregoing, the ALJ did not err. An ALJ may
21 discount a claimant's allegations that an impairment is disabling when the alleged impairment
22 did not previously prevent him from working and has not worsened. *See Gregory v. Bowen*, 844
23 F.2d 664, 666-67 (9th Cir. 1988) ("Furthermore, substantial evidence indicated that the condition

1 of Gregory's back had remained constant for a number of years and that her back problems had
2 not prevented her from working over that time.”).

3 Fourth, the ALJ noted that while Plaintiff reported 3 to 4 migraines per month (citing Ex.
4 9F, p. 16), there are few records where Plaintiff complained about acute migraine episodes or
5 chronic symptomatology; there are no neurologic deficits; and, even assuming the migraines
6 occur with the frequency alleged, they have been present since Plaintiff's Navy service, which
7 ended in 1997 (citing Ex. 3F, p. 18, Ex. 4F, p. 95, Ex. 5F, p.3) and did not preclude heavy work
8 as an equipment operator, which Plaintiff began in 2003 and continued for many years. Tr. 24.
9 Based on this evidence, it was not unreasonable for the ALJ to conclude that Plaintiff was able to
10 work at a substantial gainful activity level for many years with his migraine impairment and with
11 no apparent worsening of the frequency intensity, or duration of his symptoms. *Id.*

12 Plaintiff argues that “[o]nce he knew what they were and was prescribed medication that
13 helped to alleviate them, there was no reason to continuously report them to his medical
14 providers” Dkt. 10, p. 7. However, because Plaintiff received medication that “helped
15 alleviate” his migraines and thereafter did not continue to report debilitating symptoms or seek
16 more aggressive treatment, this confirms the ALJ's conclusion that his symptoms were not
17 debilitating and undermined his claim that his headaches would prevent him from performing
18 even sedentary jobs (Tr. 56). Plaintiff did not report ongoing debilitating migraine symptoms to
19 his providers or seek more aggressive treatment for that condition. It was not error for the ALJ to
20 consider this evidence in discounting Plaintiff's symptom testimony. *See, Burch v. Barnhart*, 400
21 F.3d 676, 681 (9th Cir. 2005) (The type of treatment a claimant seeks for their pain “is powerful
22 evidence regarding the extent to which [he] was in pain.”) An ALJ may consider a claimant's
23

1 failure to report symptoms as when discounting the claimant's allegations of debilitating
2 impairments. *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir.2006).

3 Similarly concerning Plaintiff's reports of irritability and agitation, the ALJ noted that
4 these have been present since Plaintiff left Navy service in 1997 (Ex. 7F, p.7), from which he
5 was honorably discharged (Ex. 8F, p.3). Tr. 18. The ALJ also noted that the longitudinal
6 treatment notes indicate Plaintiff has not been observed with antisocial or inappropriate behavior
7 in the clinical setting, he is able to drive an automobile and go out in public unaccompanied, and
8 is able to attend his medical appointments unaccompanied. Tr. 18 (citing Ex. 5E, p. 4, Ex. 7E, p.
9 4; Ex. 5F, p.2). Nevertheless, the ALJ concluded Plaintiff should be limited to work that does not
10 involve interaction with the public and while Plaintiff could work in the vicinity of others, he
11 should not be involved in cooperative teams, group meetings, or other group activities in an
12 employment setting. Tr. 23. Moreover, it was not error for the ALJ to discount Plaintiff's
13 symptom allegations when his impairments did not previously prevent him from working and
14 have not worsened. *See Gregory v. Bowen*, 844 F.2d 664, 666-67 (9th Cir. 1988) ("Furthermore,
15 substantial evidence indicated that the condition of Gregory's back had remained constant for a
16 number of years and that her back problems had not prevented her from working over that
17 time.").

18 In sum, substantial evidence supports the ALJ's valid reasoning to discount Plaintiff's
19 allegations of debilitating impairments.

20 **B. Medical Evidence**

21 An ALJ is not required to provide an explanation for accepting an opinion, but must
22 explain why he rejected an opinion. SSR 96-8p, available at 1996 WL 374184 at *7. When an
23 ALJ rejects a doctor's opinion that contradicts another doctor's opinion, he may do so with

1 “specific and legitimate reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*,
2 427 F.3d 1211, 1216 (9th Cir. 2005).

3 **1. Examining Physician Dr. Angela Chan**

4 Plaintiff contends the ALJ failed to give specific and legitimate reasons for rejecting the
5 opinion of the VA’s examining physician, Dr. Angela Chan. Dr. Chan completed three disability
6 benefits questionnaires in connection with Plaintiff’s VA disability rating on April 4, 2018. First,
7 she opined that Plaintiff has continued radicular pain bilaterally, marked decrease in range of
8 motion and has difficulty finding a comfortable position and therefore, would have difficulty
9 sitting in one position in order to work and is obviously unable to do physical work. Tr. 644-645.

10 Second, Plaintiff reported to Dr. Chan that his headaches have worsened over the years;
11 “he currently has tension headaches every other day and migraine headaches 3-4 times a month;”
12 and he “missed about 5 days a month of work and when he has migraine headaches he ends up
13 missing work.” Tr. 646-647. Dr. Chan noted that Plaintiff has been prescribed meloxicam and
14 cyclobenzaprine, and discovered nothing during the examination requiring immediate medical
15 care or further reevaluation for treatment purposes. Tr. 647-648.

16 Third, Dr. Chan addressed Plaintiff’s diagnosis of cervical radiculopathy, noting
17 Plaintiff’s three neck surgeries and remarking that at the time of the examination, “the patient has
18 right sided symptoms are occurring daily at 6/10 pain. The left sided symptoms are present 24
19 hours a day and is at 8/10. There is burning pain constantly. The numbness goes down into the
20 entire left hand. Right hand numbness is minimal in the thumb[b] and idle finger.” Tr. 648-649.
21 Dr. Chan concluded that Plaintiff would have difficulty using his arms due to chronic severe
22 pain. Tr. 653.

1 The Commissioner concedes the ALJ erred by crediting Dr. Chan's physical assessment
2 without fully accommodating Dr. Chan's opinion that given Plaintiff's physical impairments, "he
3 would need sedentary work" in Plaintiff's RFC. The ALJ's RFC conflicted with Dr. Chan's
4 opinion because he restricted Plaintiff only to a limited range of light work. At step five, the ALJ
5 made alternative findings regarding Plaintiff's ability to perform sedentary work. Tr. 28. The VE
6 testified that given Plaintiff's other limitations in the RFC, along with an additional restriction to
7 sedentary work, there were sedentary jobs existing in significant numbers in the national
8 economy that Plaintiff could perform (document preparer, escort vehicle driver, and touchup
9 screen PCB assembly). Tr. 28. Thus, the ALJ alternatively accounted for a sedentary limitation.
10 However, the ALJ failed to account for Dr. Chan's opinions that even if Plaintiff was limited to
11 sedentary work, he would have "difficulty sitting in one position in order to work" and would
12 have difficulty using his arms due to chronic severe pain. Tr. 644, 653. The ALJ did not address
13 whether the light and sedentary jobs identified by the VE would allow Plaintiff to change
14 positions or require him to frequently or constantly use his arms. Tr. 28. The ALJ's failure to
15 address or specifically address these portions of Dr. Chan's opinions was error.

16 The Court finds no error in the ALJ's treatment of Dr. Chan's assessment regarding
17 Plaintiff's headaches because that assessment was based primarily on the Plaintiff's subjective
18 reports rather than objective findings. An ALJ may reject a "physician's opinion if it is based 'to
19 a large extent' on a claimant's self-reports that have been properly discounted as incredible."
20 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (citations omitted). Further, the
21 ALJ's conclusion that the frequency, intensity, and duration of the migraine headaches alleged
22 by Plaintiff are not supported by the longitudinal medical evidence and Plaintiff's work history,
23 with no apparent worsening or increase in frequency of episodes was not error. Tr. 26-27. Dr.

1 Chan offered no opinion or limitations regarding Plaintiff's migraine headaches, but merely
2 noted what Plaintiff reported to her. The demonstrated ability to work full-time despite Plaintiff's
3 impairments is a valid reason to discount a doctor's opinion suggesting a claimant's limitation
4 render him unemployable. *See Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 692 (9th
5 Cir. 2009). Therefore, the ALJ rationally found that if Dr. Chan believed Plaintiff's migraines
6 would consistently cause work absences, her opinion was inconsistent with Plaintiff's work
7 history.

8 However, because the ALJ provided no explanation for failing to account for the entirety
9 of Dr. Chan's opinions – that Plaintiff would have “difficulty sitting in one position in order to
10 work” and would have difficulty using his arms due to chronic severe pain – the ALJ must
11 reconsider Dr. Chan's opinions and either credit them or provide legally sufficient reasons to
12 discount them.

13 **2. DDS Consultant Dr. Michael Brown**

14 Although the ALJ gave great weight to the opinion of DDS consultant, Dr. Michael
15 Brown, Plaintiff contends the ALJ failed to include all of Dr Brown's limitations in Plaintiff's
16 RFC – specifically, that Plaintiff had mild to moderate limitations in his ability to maintain
17 regular attendance and complete a normal workday or workweek without interruptions from
18 psychologically based symptoms. Tr. 89.

19 Plaintiff contends it was error for the ALJ to not include absences in his RFC finding
20 because the VE testified that an individual who is not able to work forty hours per week or would
21 be absent at least two days per month could not be competitively employed (Tr. 61). Dkt. 10, pp.
22 10-11. The term “moderate” in the context of assessing mental limitations means, “[y]our
23 functioning in this area independently, appropriately, effectively, and on a sustained basis is

1 fair.” 81 Fed. Reg. 66137, 66164 (Sept. 26, 2016).² A mental impairment that results in mild or
2 moderate mental deficits in the broad functional criteria—including moderate impairments in the
3 ability to complete a normal workday or workweek and maintain regular attendance and perform
4 activities within a schedule—does not constitute a “sufficiently severe non-exertional limitation
5 that significantly limits a claimant’s ability to do work beyond the exertional limitation.” *Hoopai*
6 *v. Astrue*, 499 F.3d 1071, 1077 (9th Cir. 2007).

7 Dr. Brown suggested Plaintiff had “mild-moderate” limitations with respect to
8 maintaining regular attendance and completing a normal workweek, and also found that Plaintiff
9 appeared to be able to sustain concentration, persistence, and pace without “significant issues
10 when working independently.” Tr. 89. Thus, the ALJ had no obligation to account for routine
11 unexcused absences in the RFC. Moreover, the ALJ assessed other significant restrictions to
12 accommodate Plaintiff’s psychological impairments, such as limiting him to jobs that had a
13 stable work routine with few changes, no interactions with the public or work in cooperative
14 teams, and no group meetings or other group activities. Tr. 20.

15 In sum, the ALJ did not err in his treatment of Dr. Brown’s opinion and substantial
16 evidence supports the ALJ’s decision in this regard.

17 **C. Lay Witness Testimony**

18 Naomi S., who has been married to Plaintiff for eighteen years, reported that Plaintiff’s
19 pain and lack of sleep due to pain were debilitating at times, making it difficult for him to
20 function or even walk and his activities varied day by day, based on his pain level. Tr. 204-205.
21 Pain made it difficult for him to bend, twist, and pull when dressing; reach when caring for his
22 hair; and stand when shaving. Tr. 205. Ms. S. stated that she did the house and yard work and
23

² Available at <https://www.gpo.gov/fdsys/pkg/FR-2016-09-26/pdf/2016-22908.pdf>.

1 Plaintiff did some light chores, such as changing lightbulbs and dusting, but needed positive
2 reinforcement. Tr. 206-07. Ms. S. also stated Plaintiff no longer pursued his hobbies of hunting,
3 fishing, golfing, and camping, and got overwhelmed and irritated when dealing with others, and
4 he isolated himself from his friends and family. Tr. 209. Ms. S. thought the most Plaintiff could
5 lift was five pounds and that he could only walk 500 feet before needing to rest for 10 minutes.
6 *Id.* She also observed that some of his medications caused dizziness. Tr. 211.

7 The ALJ gave some weight to Ms. S's third party function report:

8 I have finally considered and give some weight to the November 14, 2016 third
9 party function report from Naomi Samson, the claimant's wife (Ex. SE). Ms.
10 Samson's report that the claimant has a history of difficulty getting along with
11 others, including Article 15 discipline for fighting while in the Navy (many years
12 ago when he was young), is persuasive and has been considered in limiting the
claimant's work-related social interaction. Her observation that the claimant does
light household chores, drives, and can walk 500 feet also indicates that the
claimant retains physical abilities sufficient for sedentary or light exertional
activity.

13 Tr. 27.

14 The ALJ must provide specific, germane reasons for rejecting lay witness testimony. *See*
15 *Stout v. Comm'r*, 454 F.3d 1050, 1053 (9th Cir. 2006), 20 C.F.R. § 404.1513(d)(4), *Dodrill v.*
16 *Shalala*, 12 F.3d 915 918-19 (9th Cir. 1993). The ALJ gave reasons for rejecting Plaintiff's
17 testimony regarding his symptoms that may be equally relevant to the similar testimony of Ms.
18 S, and that would support a finding that the lay testimony was similarly not credible. But under
19 our rule that lay witness testimony "cannot be disregarded without comment," *Nguyen v. Chater*,
20 100 F.3d 1462, 1467 (9th Cir. 1996), the ALJ erred in failing to explain his reason for
21 disregarding the bulk of Ms. S's report. In addition, it is unclear how Plaintiff's ability to dust,
22 drive, and walk only 500 feet before needing to rest indicates that he retains physical abilities
23

1 sufficient for a full time sedentary or light job. The ALJ must reconsider the entirety of Ms. S's
2 report and either credit her opinions or comment prior to disregarding them.

3 **CONCLUSION**

4 For the foregoing reasons, the Commissioner's decision is **REVERSED** and this case is
5 **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

6 On remand, the ALJ should reconsider Dr. Chan's opinion and the third party function
7 report of Plaintiff's wife, develop the record and reassess Plaintiff's RFC as necessary, and
8 proceeding to the remaining disability assessment steps as appropriate.

9 DATED this 4th day of September, 2019.

10
11 

12 BRIAN A. TSUCHIDA
Chief United States Magistrate Judge